



1. Introduction

This principle was among those articulated in the recently published "Principles of Federal Prosecution." 1/ Paragraph 2 of Part B of the "Principles", which addresses the decision to decline prosecution, provides that:

(a) no substantial federal interest would be served by prosecution;

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(b) the person is subject to effective prosecution in another jurisdiction; or

(c) there exists an adequate non-criminal alternative to prosecution.

However, in cases in which there is a possibility that classified information may be revealed if the prosecution is pursued, an additional consideration must be addressed in determining whether it is appropriate to continue with the investigation or prosecution; that is, whether the need to protect against the disclosure of the classified information outweighs other federal interests that would be served by proceeding with the prosecution. In such cases, therefore, it is the responsibility of the Department of Justice, in consultation with the agency or agencies whose classified information is involved, to identify and assess these competing interests so that a reasoned decision may be made with respect to continuing the investigation or prosecution.

The purpose of these guidelines is to identify those factors which should be considered in determining whether to prosecute a violation of federal law where it appears that there is a possibility that classified information will be revealed if prosecution is pursued. While these guidelines do not provide an exhaustive list of all factors which may properly have a bearing on this determination, an attempt has been made to enumerate those factors which are most important and are likely to arise with some frequency.

2. General Provisions

a. Authority. These guidelines are issued pursuant to section 12(a) of the Classified Information Procedures Act of 1980 (Pub. L. No. 96-456, 94 Stat. 2025), which provides in pertinent part that:

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... the Attorney General shall issue guidelines specifying the factors to be used by the Department of Justice in rendering a decision whether to prosecute a violation of Federal law in which, in the judgment of the Attorney General, there is a possibility that classified information will be revealed.

b. Definitions. As used in these guidelines--

(1) the term "classified information" means any information or material that has been determined by the United States Government, pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in paragraph r of section 11 of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)); and

(2) the term "national security" means the national defense and foreign relations of the United States.

c. Functions of the Attorney General. The functions and duties of the Attorney General under these guidelines may be exercised by the Deputy Attorney General, Associate Attorney General, or an appropriate Assistant Attorney General. However, the exercise of these functions and authorities by an official other than the Attorney General shall in no way limit the authority of the Attorney General to review, reverse, or amend any decision made under these guidelines.

3. Initiating or Declining Prosecution

a. Determination of the propriety of initiating or declining prosecution.

Where, in the judgment of the Attorney General, it appears that the prosecution of a violation of federal law may result in the disclosure of classified information, the Attorney General shall determine whether the potential damage to the national security that might result from such disclosure outweighs other federal interests that would be served by the

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prosecution of the offense. If it is determined, after review of all relevant factors, that the potential damage to national security interests posed in prosecuting such a case outweighs other federal interests in proceeding with prosecution, prosecution of the offense may be declined. ✓

In making this determination, the Attorney General shall assess all relevant information and evidence, consult with and seek the advice of the appropriate interested departments and agencies, and, whenever appropriate, fully utilize the procedures set out in the Classified Information Procedures Act of 1980 in order to assess more accurately the probability that classified information would be disclosed if the case were prosecuted, and the likely nature and extent of such disclosure.

b. Factors bearing on the decision to initiate or decline prosecution.

In rendering a decision whether to prosecute a violation of federal law where there is a possibility that classified information may be revealed, the following factors, among others, should be considered:

(1) The likelihood that classified information will be revealed if the case is prosecuted. All relevant considerations bearing on this issue should be weighed, including:

(a) whether it will be necessary for the government to reveal classified information publicly in order to establish an element of the offense;

(b) whether the introduction of classified information will be sought by the defendant as a means of establishing a defense;

(c) whether the government will be required to disclose classified information to the defendant under the Brady doctrine, the Jencks Act, or in fulfillment of due process or other requirements;

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(d) the likelihood that, under the procedures of the Classified Information Procedures Act, classified information sought to be disclosed publicly by the defendant would be found to be inadmissible, or the government would be permitted to use a substitute for the disclosure of specific classified information;

(e) the number and nature of persons to whom disclosure of classified information may be necessary, and the nature and extent of protective measures that may be available to prevent disclosure beyond authorized recipients; and

(f) whether the government's refusal to permit disclosure of classified information would result in dismissal of the indictment or a lesser sanction.

(2) The damage to the national security that might result if the classified information is revealed. All relevant considerations bearing on this issue should be weighed, including:

(a) the nature and extent of anticipated harm to the foreign relations or national defense of the United States;

(b) the level of classification and sensitivity of the information at issue;

(c) the extent of any previous unauthorized disclosure of the information; and

(d) the likelihood that disclosure of classified information in the course of the prosecution would confirm the accuracy of classified information previously unsubstantiated.

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(3) The likelihood that the government would prevail if the case were prosecuted. As in all federal prosecutions, in any case where proceeding with prosecution may result in disclosure of classified information, the likelihood of a successful prosecution based on the available evidence should be established.

(4) The nature and importance of other federal interests that would be served by prosecution. Although an assessment of the federal interests that would be served by prosecution is a consideration in the decision to prosecute any case, where proceeding with prosecution may result in the disclosure of classified information that would create a risk of damage to the national security, all relevant considerations bearing on this issue should be carefully weighed, including:

- (a) the seriousness of the offense charged;
- (b) the extent of the prospective defendant's involvement in the commission of the offense;
- (c) the likely sentence that would be imposed if conviction were obtained;
- (d) the likely deterrent effect of conviction; and
- (e) the availability of adequate non-criminal alternatives to prosecution.

4. Reservation

a. Relation to the authority of the Attorney General. Nothing in these guidelines shall be construed to limit the authorities or responsibilities of the Attorney General under the Constitution or laws of the United States.

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b. Non-litigability. The guidelines set forth herein are solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by any party to any matter, civil or criminal.

5. Term and Effective Date

These guidelines shall become effective on June 10, 1981, and shall remain in effect until modified in writing by the Attorney General.

Issued this 10th day of June, 1981.

A handwritten signature in dark ink, appearing to read 'William French Smith', written in a cursive style.

WILLIAM FRENCH SMITH
Attorney General

